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## UNEQUAL EDUCATIONAL EXPENDITURES: SOME MINORITY VIEWS ON SERRANO V. PRIEST

NORMAN VIEIRA\*

### INTRODUCTION

In *Serrano v. Priest*<sup>1</sup> the California Supreme Court held that an educational financing system in which the amount of spending in each school district depends largely upon local property tax revenues, and hence upon the value of a community's real property, violates the equal protection clause of the fourteenth amendment. The court's major premise, sometimes styled the new equal protection, was that unequal state treatment in areas of "fundamental interest" requires a showing that the inequality is necessary to some "compelling" state purpose. This premise rejects the traditional rule which demanded only proof of a rational relationship to a legitimate purpose. The California court found education to be a fundamental right and deemed local financing plans unnecessary to any compelling state objective. Since *Serrano* arose on demurrer, it was enough to decide that the complaint stated a cause of action, and the problem of enforcing an appropriate remedy was not discussed.

Whatever position one takes concerning the *Serrano* case, all agree that it ranks among the most significant constitutional rulings of recent years. Nearly every state in the country has adopted a system of educational finance which shares some of the features held constitutionally deficient by the California court.<sup>2</sup> Moreover, in light of the broad grounds invoked for the *Serrano* decision, this case carries major implications not only for the future of public education but for local government generally and for the judicial process itself. Because of the overriding importance of these issues, it is essential that opposing views on the constitutionality of unequal educational spending be fully explored. The courts, however, have tended to arrive at unanimous results in these cases, despite the manifest difficulty of the problem.<sup>3</sup> The purpose of this article is to set forth some of the views which might have been presented in a minority opinion, if one had been prepared. The article is couched in the form of hypothetical dissenting and concurring opinions<sup>4</sup> in *Serrano v. Priest*,

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1. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

2. Hawaii has the only statewide financing system in current operation. The other 49 states tolerate substantial inter-district variations in spending, produced partly by variations in wealth. A. WISE, RICH SCHOOLS, POOR SCHOOLS 122-26 (1968).

3. No dissenting opinion has been written in any of the major school finance cases, though one judge in *Serrano* cast a dissenting vote.

4. I am indebted to those who have employed and refined this style in the past. E.g., Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962); Rosenberg, *Two Views on Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459 (1967).

but its substance also applies to subsequent decisions in Minnesota<sup>5</sup> and Texas<sup>6</sup> which accepted *Serrano* without dissent.

#### SERRANO V. PRIEST

TORY, J., *dissenting*.

In this case the court holds that a public school financing system which relies heavily on local property taxes and thereby produces substantial spending disparities among the various school districts violates the equal protection clause. More generally, the majority rules that disparate spending on matters of "fundamental interest," even though fairly related to legitimate state concerns, is unconstitutional unless those concerns are "compelling" and the differences in expenditures are "necessary." Because I think these soothing propositions, for all their surface appeal, are unsound in principle and unwarranted by the case law, I reluctantly dissent from the majority's well-intentioned effort to remedy a major problem of educational finance. My opinion will deal first with the fundamental rights doctrine and then with the efficacy of the court's rule of fiscal neutrality.

#### I. *The Fundamental Rights Doctrine*

In supporting its position, the court places great reliance on its own "recent decisions [finding that] the United States Supreme Court has employed a two-level test" of equal protection under which a compelling justification is required for legislative classifications in all areas of fundamental interest, though a reasonable justification suffices in other areas.<sup>7</sup> But despite speculation suggesting such a broad application for the new equal protection doctrine, Supreme Court cases have in fact been quite restrictive.<sup>8</sup> To be sure, there are some fields—voting and criminal procedure, for example—in which judicial review has approximated this court's test. But to recognize this is not to suggest that every interest which a court deems "fundamental" should occasion heavy-handed judicial intervention. The Supreme Court decisions invoking the compelling justifi-

5. *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971).

6. *Rodriguez v. San Antonio Ind. School Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971), *prob. juris. noted*, 92 S. Ct. 2413 (1972).

7. 5 Cal. 3d at 597, 487 P.2d at 1249, 96 Cal. Rptr. at 609.

8. I put to one side the decisions governing racial discrimination. Those decisions, while subjecting racially based action to close scrutiny, do not turn on whether the area of discrimination is fundamental or trivial. See *Vieira, Racial Imbalance, Black Separatism, and Permissible Classification by Race*, 67 MICH. L. REV. 1553 (1969). In the case before us the fundamental rights doctrine is indispensable, since the type of classification involved here is common to nearly all municipal and county services and could not by itself require a compelling justification. See J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* 339-446 (1970); Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 22-23 (1969). In view of the ultimate reliance on the fundamental rights theory, it is unnecessary for me to give separate treatment to the court's identification of wealth as a suspect classification.

cation test are not only confined to a few narrowly circumscribed areas of governmental action but have served such limited functions, as we shall see, that even if carried to their logical conclusion, the cases would not control the dispute before us.

One function of the new equal protection has been to safeguard the substantive freedoms embodied in the Federal Constitution. This was the implicit burden of *Shapiro v. Thompson*,<sup>9</sup> which focused on the "fundamental right of interstate movement," and it was the explicit justification for *Williams v. Rhodes*,<sup>10</sup> which invoked the freedom of association. In such cases something more than a rational explanation is properly required for unequal treatment, given the express mandate for special protection of constitutionally guaranteed liberties.<sup>11</sup> With respect to unprotected activities on the other hand, the concern of the new equal protection cases has been, not to review substantive judgments, but to assure effective access to the decision-making organs of government. It is this common concern which unites the voting and criminal procedure cases.<sup>12</sup> Just as a broadly based franchise is essential to representative democracy, so access to the courts is necessary to a system of equal justice; and in order for access to be meaningful, it often must include the right to appointed counsel and related assistance.<sup>13</sup> In safeguarding access to government, courts enforce only a right to be heard and usually upset no substantive decision of the political branches. Indeed, the legitimacy of the government's substantive policies is arguably enhanced when persons affected by them have access to the decision-maker. Commentators have accordingly argued that "several of the common objections to an enlarged judicial review lose much of their persuasiveness . . . where the challenge is not to remake substantive policy, but to supervise the procedures through which laws are enforced upon individuals."<sup>14</sup>

9. 394 U.S. 618, 638 (1969) (emphasis added). The casual, or perhaps calculated, use of the term "fundamental" to describe various constitutional rights has led some writers to assume that the new equal protection applies to all basic rights rather than to constitutional liberties. However, *Dandridge v. Williams*, 397 U.S. 471 (1970), shows that *Shapiro* was a travel case and not a case of fundamental rights *simpliciter*. See text accompanying notes 34-36 *infra*. The freedom of interstate travel has consistently been held constitutionally protected. See, e.g., *United States v. Guest*, 383 U.S. 745 (1966).

10. 393 U.S. 23 (1968).

11. Of course the fact that these liberties are to some degree independently secured does not make this aspect of the new equal protection superfluous. As *Shapiro* demonstrates, a restriction on constitutional freedoms which is valid under both the traditional equal protection test and the specific provisions safeguarding those freedoms may be unconstitutional under the fundamental rights doctrine.

12. See, e.g., *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Harper v. Virginia Bd. of Educ.*, 383 U.S. 663 (1966); *Douglas v. California*, 372 U.S. 353 (1963). The same concern is sometimes expressed in cases involving the processes of civil courts. See *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

13. See, e.g., *Douglas v. California*, 372 U.S. 353 (1963) (counsel on appeal); *Griffin v. Illinois*, 351 U.S. 12 (1956) (free transcript).

14. Kadish, *Methodology and Criteria in Due Process Adjudication: A Survey*

The new equal protection has thus been confined by the Supreme Court to matters involving constitutionally protected liberties or the processes of government, and it is susceptible to being limited to those fields. Since the problem of school finance is far removed from both of those areas,<sup>15</sup> a major extension of doctrine is required to reach this case.

But if the new equal protection is extended to appropriations for education, it will be wholly indistinguishable from the discredited regime of *Lochner v. New York*.<sup>16</sup> Under that regime, courts freely substituted their judgment for that of the legislative branches on a variety of subjects not set forth in the Constitution but deemed important to the liberalism of the times. "Rates set by public-utility commissions were disallowed as confiscatory. Statutes regulating working conditions were held to impair 'liberty of contract.' Taxes were invalidated."<sup>17</sup> The results were not uniformly destructive of regulatory power, "but this only emphasized the fact that the Court, and not the legislature, became the final judge of what might be law. . . ."<sup>18</sup> Women's working hours could be regulated,<sup>19</sup> but not their rates of pay.<sup>20</sup> Men, on the other hand, had a constitutional right to work more than 10 hours per day in a bakery,<sup>21</sup> though they could be barred from working more than 8 in a coal mine.<sup>22</sup> Prices might or might not be regulated, depending on whether courts believed the matter was "affected with a public interest." This meant that the rates charged by stockyards,<sup>23</sup> fire insurance companies,<sup>24</sup> and tobacco warehouses<sup>25</sup> could be controlled, but gasoline prices<sup>26</sup> and employment agency fees<sup>27</sup> were constitutionally immune to regulation. In the field of labor-management relations the government had no power to protect employees against being discharged for joining a union<sup>28</sup> and no power to refuse to protect employers against being picketed or boycotted by employees.<sup>29</sup> Although most of these cases fell under the spell of substantive due process, they could as easily have been brought within the broad reach of the equal protection clause, since the statutes under review restricted some activities

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and Criticism, 66 YALE L.J. 319, 358 (1957). See also Mendelson, *Mr. Justice Frankfurter and the Process of Judicial Review*, 103 U. PA. L. REV. 295, 308 (1954).

15. See note 41 *infra*.

16. 198 U.S. 45 (1905).

17. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 5 (1964).

18. R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 70 (1941).

19. *Muller v. Oregon*, 208 U.S. 412 (1908).

20. *Adkins v. Childrens' Hosp.*, 261 U.S. 525 (1923).

21. *Lochner v. New York*, 198 U.S. 45 (1905).

22. *Holden v. Hardy*, 169 U.S. 366 (1898).

23. *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79 (1901).

24. *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389 (1914).

25. *Townsend v. Yeomans*, 301 U.S. 441 (1937).

26. *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929).

27. *Ribnik v. McBride*, 277 U.S. 350 (1928).

28. *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908).

29. *Truax v. Corrigan*, 257 U.S. 312 (1921).

and left other similar ones unaffected. The basic fact is that there is no meaningful difference between an expansive new equal protection and the old substantive due process.<sup>30</sup> The resurrection of this brand of "exacting scrutiny," whether cloaked in the mantle of due process or of equal protection, would threaten vast areas of state and federal legislation. The majority attempts to avert that problem by limiting the application of the compelling justification test to rights which judges consider "fundamental." But this, I shall suggest, is an elusive and unreal limitation unless the latter term is confined—as it has been in the Supreme Court—to freedoms protected by the Constitution and matters involving the processes of government. For if substantive policies can be struck down whenever courts determine without guidance from the constitutional text that a particular subject is "fundamental," judicial intervention will surely be as random and capricious as it was under *Lochner* and its progeny, which also relied on the supposed fundamental nature of the rights in question.<sup>31</sup>

In considering the feasibility of an unguided judicial inquiry into the "fundamental" quality of various legal interests, it is instructive to focus upon the bases for the majority's conclusion that education is a fundamental interest. The court sets forth five reasons for so finding: (1) Education preserves a person's opportunity to compete in the market place; (2) it is universally relevant; (3) it continues over a long period of life; (4) it molds the personality of youth; and (5) it is compulsory.<sup>32</sup> Since the court does not pause to explain the meaning of the term "fundamental," it is not clear why these five factors entitle education to special judicial protection. What is clear is that these factors are by no means peculiar to education. With one exception, all of the arguments are applicable to public health services, for instance. The delivery of decent health care preserves the opportunity to compete, is universally relevant,

30. For an early application of the "new" equal protection see *Truax v. Corrigan*, 257 U.S. 312 (1921), holding that states could not withdraw injunctive relief in some civil cases, while leaving it available in others. *Truax*, like much of the judicial output of its era, has been substantially repudiated. *Senn v. Tile Layers Protective Union*, 301 U.S. 468 (1937). See generally W. LOCKHART, Y. KAMISAR and J. CHOPER, *CASES ON CONSTITUTIONAL LAW* 461-63 (1970).

31. See, e.g., *Truax v. Corrigan*, 257 U.S. 321, 338 (1921), calling for close review "when fundamental rights are . . . attempted to be taken away. . . ." This philosophy was applied during the *Lochner* era to personal freedoms as well as to property rights. See *Meyer v. Nebraska*, 262 U.S. 390 (1923). Conversely, the new equal protection, if not contained by the Bill of Rights, would reach property as well as personal rights. Cf. *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972), acknowledging that "the dichotomy between personal liberties and property rights is a false one" and that such a distinction would be almost impossible to apply. Thus it is not surprising that police and fire protection, street maintenance and garbage collection have been put forward as fundamental rights. Ratner, *Inter-neighborhood Denials of Equal Protection in the Provision of Municipal Services*, 4 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 1, 19-23 (1968). For an illustration of how far this technique might carry us see *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), indicating that the freedom to wear long hair is fundamental.

32. 5 Cal. 3d at 609-10, 487 P.2d at 1258-59, 96 Cal. Rptr. at 618-19.

continues over a longer period of life than formal education, and especially in its psychological aspects, it molds the personality of the young and of everyone else in society. Of course, health care is usually not compulsory in the sense of being mandated by government, though few people believe they have a realistic option to do without it. But the compulsory nature of education is quite irrelevant to this case, since I do not understand the majority to suggest that the repeal of school attendance laws would in any way alter the requirements of today's decision.<sup>33</sup> If the quality of medical services in a public hospital—such, for example, as the availability of a kidney machine or other life-preserving devices—may be based on wealth, I cannot understand why the equal protection clause should be read to require a different result in education.

The arguments which the majority advances for holding education to be a fundamental interest also apply in varying degrees to housing and other necessities of life. Indeed, many educators believe that decent food and housing are indispensable to a child's success in school. The necessities of life mold the personality of youth, preserve the opportunity to compete, are dispensed over a long period of time, and are universally relevant. Yet the United States Supreme Court has rejected the compelling justification standard both in the field of public housing and in the field of aid to families with dependent children. In *Dandridge v. Williams*<sup>34</sup> the Court upheld a ceiling on welfare payments on the ground that it was rationally related to legitimate state interests in encouraging gainful employment and maintaining economic parity between welfare families and the working poor. The fact that the legislative classification discriminated against children in large families and was both over-inclusive and under-inclusive<sup>35</sup> was ruled to be immaterial in a case dealing with "state

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33. Some states do not prescribe school attendance, and those that do prescribe it appear to base their policy not so much on the importance of education as on the incapacity of children to exercise free choice. Thus, most states draw their attendance laws in terms of age, which means, for illustration, that a 16 year old immigrant is under no obligation to go to school even though he is in fact illiterate. See Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. Pa. L. Rev. 373, 393-94 n.74 (1969). Sometimes health care, too, is made mandatory for children, again because of their incapacity to choose. See *Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967). The compulsory nature of education therefore provides no adequate basis for distinguishing among various public services. See note 36 *infra*. In any event, if our guide is to be the states' assessment of the role of education, there is no obvious reason why the government's decision to require school attendance should be given greater weight than its concomitant judgment that a foundation plan guarantee is sufficient to meet its educational goals.

34. 397 U.S. 471 (1970).

35. The Court conceded that many welfare families had no employable members and that others would not qualify for the maximum payment. *Id.* at 486. Neither the exclusion of the latter group from the state's classification nor the inclusion of the former could serve the asserted interest in stimulating employment.

regulation in the social and economic field. . . ."<sup>36</sup> No reason has been suggested for finding that the term "social and economic field" does not include matters of educational finance. Similarly in *James v. Valtierra*<sup>37</sup> the Supreme Court sustained a requirement that "low-cost" public housing be approved by local referendum. Although the wealth classification in that case was explicit and the subject matter was of high importance, not only in relation to housing but in relation to the quality of available education as well,<sup>38</sup> the state was not required to show either that its classification was necessary or that the justification for it was compelling. It was enough that a procedure for local approval of low-cost housing would give people in the community "a voice in a decision which may lead to large expenditures of local governmental funds for increased public services. . . ."<sup>39</sup>

The majority chooses to discuss neither *Dandridge* nor *Valtierra*. Yet, in view of the intimate relationship between home environment and educational achievement,<sup>40</sup> it is difficult to see why education is a fundamental interest, if decent housing and other basic necessities of life are not. What is important about the court's oversight, however, is not simply that *Dandridge* and *Valtierra* might control the particular controversy before us, but that both of those cases provide appropriate testing grounds for the general proposition that judges may strike down a reasonable legislative classification whenever they believe that a fundamental interest is at stake, and that the classification is unnecessary or the justification for it is not compelling. Because of its failure to confront the problem of distinguishing between education and housing or social welfare, the court has missed the central issue which its theory presents: whether judicially manageable standards exist for determining, without guidance from the Bill of Rights, which interests are so "fundamental" as to require special treatment. For me, the lesson which must be drawn from the need to distinguish between such profoundly important and virtually inseparable subjects as education and housing or aid to dependent children is that the fundamental rights doctrine is fundamentally unsound when extended to substantive matters unprotected by the Bill of Rights.<sup>41</sup> Such a doctrine,

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36. *Id.* at 484. It was also immaterial that all jurisdictions provide aid to families with dependent children and that the practical effect of the state-imposed duty to care for one's children is to compel the very poor to seek welfare assistance, much as the mandate for school attendance compels the poor to attend public schools.

37. 402 U.S. 137 (1971).

38. Under current school assignment policies, access to housing generally determines access to the schools.

39. 402 U.S. at 143. For cases adhering to the *Dandridge* and *Valtierra* principles see *Lindsey v. Normet*, 405 U.S. 56 (1972); *Richardson v. Belcher*, 404 U.S. 78 (1971).

40. See notes 51-53 and accompanying text *infra*.

41. The majority implies at one point that special treatment of education may be justified by the impact of schooling on first amendment rights, though no suggestion is made that the Constitution confers any right to be educated



though intended to implement contemporary ideals, suffers from precisely the same defects as *Lochner v. New York*, which advanced mainly the ideas of a few judges; and I see no cause to believe that this judicial approach will function more appropriately for the indefinite future than it did in the recent past.<sup>42</sup>

## II. *The Efficacy of Fiscal Neutrality*

I have concentrated to this point on questions of institutional competence to which the court is strikingly inattentive. But even assuming that we are wise enough to avoid the errors of an earlier generation of judges who gave special protection to fundamental rights, and assuming also that education is such a right, the course charted by the majority seems to me quite ill-conceived. First, there is no assurance whatever that existing disparities in educational expenditures will be corrected by this decision. It is, in fact, one of the virtues claimed for the principle of fiscal neutrality that it leaves the government free to adopt any system of educational finance which is not tied to local wealth. For example, some advocates of the principle propose a "district power equalizing" plan under which each local community would fix its own tax rate, which in turn would determine its level of spending for education; poor districts not generating enough funds for the prescribed level of spending would in effect be subsidized by districts which raised more money at their tax rates than they were permitted to spend for education.<sup>43</sup> In short, local

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at public expense. 5 Cal. 3d at 608 n.25, 487 P.2d at 1258 n.25, 96 Cal. Rptr. at 618 n.25. But applying the new equal protection to all subjects which *affect* constitutionally protected rights would be far different from applying it, as the Supreme Court has done, to subjects which are themselves constitutionally protected. Almost everything that the government does can be related to the Bill of Rights: Social security benefits affect the right to travel; labor laws and income taxes affect the operation of a free press; and public health services affect the exercise of all constitutional rights. If unprotected activities were brought within the scope of the new equal protection theory whenever they have an impact on protected activities, a course which the Supreme Court plainly rejected in *Dandridge* and *Valtierra*, the theory would have no visible limits.

42. In at least one respect the new doctrine would be even more far-reaching since, unlike *Lochner*, it would call for the invalidation of admittedly reasonable classifications. I can think of no greater threat to the responsible discharge of legislative duties than for courts to impose on an ill-defined category of fundamental interests a requirement of compelling justification, which our experience shows can rarely be satisfied. See Comment, *School Desegregation After Swann: A Theory of Government Responsibility*, 39 U. CHI. L. REV. 421, 441-42 (1972) ("a state has never succeeded" in satisfying this test). What that requirement would mean in the field of education is fairly apparent. The compelling justification standard could not be confined to spending disparities but would extend to inequalities in curriculum, teaching staff, physical plant, special services, and student assignment plans. The implications for local control of education and for the state and federal courts, which have not yet succeeded in enforcing the lesser demands of *Brown v. Board of Education*, 347 U.S. 483 (1954), and have received little training for the role of educational policymaker, are staggering.

43. The state might provide, for instance, that a tax rate of 10 mills would result in a per pupil expenditure of \$500 and that for every additional 2 mills another \$100 would be added to spending. All districts electing a given tax rate

communities would control the effort expended on education but would be insulated against the consequences of differences in local wealth. Plainly enough, the proposed system would permit a presently disadvantaged district simply to reduce its tax load while leaving its allegedly inferior school system untouched. Whatever might be said concerning the majority's characterization of education, it has never been suggested that the level of local taxation is a matter of fundamental constitutional concern.<sup>44</sup> More important, there is simply no reason to believe that differences in local effort will operate less capriciously on educational quality than differences in local wealth. Decisions concerning tax effort for education will inevitably be affected by the tax burden occasioned by other public services, and since the latter services may be locally financed—at least until some court is persuaded that they are “fundamental”—the decision regarding education will depend in considerable part on whether there is enough local wealth to sustain a high tax rate for the schools. Instead of making educational spending dependent upon district wealth, we will have made it dependent upon (1) the extent to which other public needs drain the resources of the community and (2) the relative value placed by the community on education and low tax rates. Some would applaud this change, while others would condemn it. But I can find no difference of constitutional dimension between the present financing system and one in which a child's schooling depends on his neighbor's appreciation of the worth of an education and on his community's ability to exert a competitive effort.<sup>45</sup> The choice between these debatable alternatives belongs, therefore, to the legislative and not to the judicial branch.

The majority implies, however, that if fiscal neutrality does not accomplish the court's objectives it may require “territorial uniformity” of expenditure in the various school districts.<sup>46</sup> Unhappily, the latter approach would seem to invalidate Title I of the Elementary and Secondary Education Act, which provides federal aid “to local educational agencies serving areas with concentrations of children from low-income families,”<sup>47</sup> a territorial classification that presumably benefits many members of the plaintiff class. This approach would also require the surrender of local fiscal control, since otherwise educational expenditures would depend upon the spending decisions of each school district. But even a policy of strict

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would spend exactly the same amount. See J. Coons, W. Clune & S. Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 319-21 (1969).

44. To the extent that the thrust of the court's opinion is to protect taxpayers, it cannot be confined to school-related interests.

45. Even if an individual could easily move to a neighborhood that shares his educational values—an assumption which in the case of the disadvantaged may exaggerate personal mobility—this would not meet the problem posed by the inability to compete effectively. In order to overcome both problems, one would have to move into a reasonably prosperous district, and this will be just as difficult under a scheme of fiscal neutrality as under present funding policies.

46. 5 Cal. 3d at 611-13, 487 P.2d at 1260-62, 96 Cal. Rptr. 620-22.

47. 20 U.S.C. § 241a (1970).

equalization<sup>48</sup> will not eliminate educational inequality. Given the vastly greater needs of schools in disadvantaged areas, such a policy might perpetuate rather than destroy inequality. Nor will equalization necessarily raise the most impoverished schools to the current spending level of the most affluent ones, though that is the dream of many of its advocates. Courts can require equal spending, but they cannot control the level of expenditure. The states could therefore equalize spending by reducing all schools to whatever common denominator they saw fit. Finally, even if equalization should lead to greater total expenditures for education, we cannot know whether the results will be helpful or harmful, since the answer to that question depends upon the other needs of the community and upon the prospects for meeting them in the face of the increased costs of education. Surely it is the political branches of government which must determine whether schools should receive more funds at the expense of health care, urban development or penal reform.

Perhaps one reason the majority feels free to gloss over the disturbing questions of institutional competence in this case is that it underestimates the difficulty of enforcing a meaningful decree in the face of inadequate public support for its objectives. Under either a fiscal neutrality or an equalization approach, I believe courts are likely soon to be faced with evasive and retaliatory measures, a number of them resistant to judicial control, in many of the 49 jurisdictions which an interpretation of the equal protection clause would reach. The simplicity of the fiscal neutrality formula will almost certainly vanish as soon as the state offers plausible non-wealth explanations for variations in educational expenditures. For example, the government might allocate funds in direct proportion to scores achieved on educational tests. Such a policy would not be based on wealth and could not be pronounced irrational, but it would favor largely the same class of children as the present financing system allegedly does: those whose home environment is relatively rich and conducive to successful competition in school. Alternatively, local governments may try to avoid the impact of today's decision through their control over the assessment of real property. Property taxes are based on assessed rather than market value, and the relationship between these two values usually varies with local practice.<sup>49</sup> Consequently, in order for equal tax rates to yield equal tax burdens, the correlation between market and assessed values would have to be equalized throughout the state. And ultimately the United States Supreme Court would have to stand ready to review property assessments, since otherwise the principle of fiscal neutrality could be subverted by setting artificially low assessments.

It may also be necessary to contend with retaliatory action by large

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48. It is not entirely clear whether the court is suggesting that equalization is required or only that inequalities in spending cannot be based on geography.

49. See C. DALY, *THE QUALITY OF INEQUALITY: SUBURBAN AND URBAN PUBLIC SCHOOLS* 98-99 (1968).

numbers of citizens who do not share this court's enthusiasm for redistributing the costs of educating the young. Affluent taxpayers who wish to educate their own children without subsidizing the education of other people's children may simply repair to private schools and then exert their political influence to reduce funding for public education. Or the same result could be achieved in part by leaving certain areas of education—foreign languages, let us say—to private consumption and increasing expenditures in other areas. Under the latter approach the affluent could maintain a relatively low tax effort, supplemented by some private spending, without altering either the education offered to their children or the degree of their subsidization of education in other school districts. Of course, these devices might never be invoked, but that seems unlikely, and their availability suggests the difficulty we will encounter in achieving hard results in this field.<sup>50</sup>

Finally, even if today's decision is fully implemented, inequality of educational opportunity will persist. The majority never really confronts the question whether a redistribution of funds for education will remedy this inequality. But the crucial fact, which should discipline our treatment of the issue before us, is that no persuasive evidence has been found to connect the quality of education with the magnitude of school expenditures. The Coleman Report,<sup>51</sup> a thorough exploration of the issue prepared for the Office of Education, concluded that differences in spending have almost no effect on educational achievement. That report and numerous other studies have found that the critical determinant of academic performance is the student's own socio-economic background and the most influential school factor is the social class level of the student body.<sup>52</sup> If this is so, the majority's answer to the problem of educational inequality is sadly misdirected. After funds are shifted from one geographical area to another, students in impoverished districts will still receive an unequal education because of the social class level of their schools. The best available evidence thus cautions against the simplistic assumption that a reallocation of school funds will substantially affect educational opportunity.<sup>53</sup> Perhaps when adequate remedies are found for the academic isola-

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50. Some may believe that the unpopularity of property taxes will galvanize public support for this decision. But in fact the issues of school finance and property taxation are entirely separable. The court's holding does not in any way impair the validity of the property tax. Conversely, the property tax burden can be relieved, as many have already proposed, without accepting the dogma of constitutionally mandated fiscal neutrality.

51. OFFICE OF EDUCATION, U.S. DEPT OF HEALTH, EDUCATION, AND WELFARE, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (J. Coleman ed. 1966).

52. *Id.* at 290-325. See also, e.g., Wilson, *Residential Segregation of Social Classes and Aspirations of High School Boys*, 24 AM. SOC. REV. 836 (1959). A reexamination of Doctor Coleman's data has confirmed his findings while at the same time improving on the methodology of the original report. See F. MOSTELLER & D. MOYNIHAN, ON *EQUALITY OF EDUCATIONAL OPPORTUNITY* 36-45, 69-115, 230-340 (1972).

53. The court treats this assumption as raising a question of fact to be proved at trial. As a result, the announced principle requiring that the quality,

tion of the poor, some genuine progress can be made toward educational equality; but I am not prepared to return to *Lochner v. New York* for the trivial results promised by this case.

We have, then, no reason to assume that today's decision will be readily enforced, no reason to believe, if it is enforced, that differences in tax effort will operate less capriciously than differences in wealth, and no reason to expect that an effective redistribution of school funds would have a significant impact on educational quality in any event. The court nevertheless charges ahead, relying on remote analogies to voting and criminal procedure cases. Yet the majority at no time addresses the closest analogies to the current state practice of school finance. The most striking analogy, of course, is to disparities in educational spending among the states. It is well known that the difference between the average per child expenditure in Alabama and that in New York is as great as the inter-district differences in most states.<sup>54</sup> But the court does not suggest that the due process clause of the fifth amendment imposes a duty on Congress to eliminate differences among the states. Since students in a highly mobile society will have to compete across as well as within state lines, it is not clear why the states are under a greater burden than Congress to eliminate spending disparities within their jurisdiction. Nor does the majority succeed in distinguishing *McInnis v. Ogilvie*<sup>55</sup> and *Burruss v. Wilkerson*,<sup>56</sup> in which the United States Supreme Court affirmed the dismissal of educational finance suits substantially identical to this one. In both *McInnis* and *Burruss* the plaintiffs argued that unequal distribution of wealth in their states caused unequal spending for education, and the papers before the Supreme Court specifically urged the principle of fiscal neutrality<sup>57</sup> which this court now adopts. The fact, stressed by the majority, that the *McInnis* and *Burruss* plaintiffs also made broad claims

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not the cost, of education be freed from any dependence on local wealth has no application as yet. See 5 Cal. 3d at 601 n.16, 487 P.2d at 1253 n.16, 96 Cal. Rptr. at 613 n.16. Since the outcome of this case is wholly contingent upon the plaintiffs' luck in proving what most knowledgeable observers agree is not susceptible to proof—that the level of expenditure determines educational quality—the majority may well succeed in nothing more than stirring up false hopes.

Some proponents of judicially ordered fiscal neutrality argue that "[i]f money is inadequate to improve education, the residents of poor districts should at least have an equal opportunity to be disappointed by its failure." J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 30 (1970). But the right to be equally disappointed is hardly entitled to constitutional status. Recognizing this, and noting the data in the Coleman Report, commentators have begun to propose that increases in public spending be allocated to the improvement of home and neighborhood environments rather than to the classroom. See F. MOSTELLER & D. MOYNIHAN, *supra* note 52, at 168-229. At any rate, the data suggest no reason for making the standard of judicial review more stringent in educational finance cases than in social welfare cases. See *Dandridge v. Williams*, 397 U.S. 471 (1970).

54. A. WISE, RICH SCHOOLS, POOR SCHOOLS 125 (1968).

55. 394 U.S. 322 (1969).

56. 397 U.S. 44 (1970).

57. E.g., Brief for Appellant at 15, *McInnis v. Ogilvie*, 394 U.S. 322 (1969).

for relief based on "need" is simply irrelevant, for the existence of the broader claims would not justify dismissal of the suits on the pleadings unless the narrower claims were likewise rejected.<sup>58</sup>

None of this gives pause to the court, which today is mesmerized by the inequality of spending among school districts. There is, however, a simple and constitutionally sufficient explanation for most of those inequalities. Affluent school districts spend more money for education, by and large, because their property owners pay more tax dollars. Such a direct relationship between the amount of money paid in taxes and the amount expended on public services has never been deemed unconstitutional. Indeed, the telling truth is that even in areas which the Constitution explicitly protects, such as the right to counsel, the fourteenth amendment has required only some provision for minimum fairness and has not demanded equal spending or fiscal neutrality.<sup>59</sup> Of course, taxpayers in prosperous school districts do not necessarily pay a high rate of taxation; often one of the inducements for making large investments in a community's real property offerings has been the low tax rate resulting from the regressive nature of the property tax. But it would require a remarkably dogmatic brand of economics,<sup>60</sup> and a loose sense of history as well, to read a mandate for progressive taxation into the Federal Constitution.<sup>61</sup>

And so, while I fully share the court's concern for the problem of unequal educational opportunity, I do not believe the way to effective reform lies in judicial intervention. There is simply no adequate basis for reading into the fourteenth amendment a rule that expenditures for education may be based on tax effort but not on taxable wealth, while expenditures for health care and welfare assistance may be based on wealth, effort or any other rational consideration. Until we learn far more about how to improve student performance, we cannot be confident that educational spending will contribute more toward maximizing academic achievement than general funding for other social services. In this state of relative ignorance, we should enlist the fact-finding processes of the legislative

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58. The complaint in the present case also advances a "needs" theory, but the court holds that aspect of the case to be non-justiciable. If this holding is sound, it is difficult to see how the court can prevent wholesale evasions of its decree where need is made the asserted basis for educational appropriations.

59. For a discussion of the diverse local practices in providing counsel to the indigent see L. SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS* (1965).

60. See generally W. BLUM & H. KALVEN, *THE UNEASY CASE FOR PROGRESSIVE TAXATION* (1953).

61. The founders provided in article I, section 9, that "[n]o capitation, or other direct Tax, shall be laid, unless in Proportion to the Census. . . ." This provision was interpreted long after the adoption of the fifth and fourteenth amendments to require that federal taxes on income from real property be apportioned according to population. *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895). It was only in 1913 that this constitutional mandate for highly regressive taxation was modified by the sixteenth amendment and Congress was given a free hand to establish a progressive tax on property.

branches, rather than dismiss those processes by constitutionalizing the matters before us.

WHIG, J., *concurring*.

I agree with Judge Tory that the new equal protection cases upon which the majority relies<sup>62</sup> are properly confined to freedoms protected by the Constitution and matters involving access to government. I would, however, add a few qualifying remarks. First, I question whether we can entirely avoid the type of inquiry which the court undertakes into the "fundamental" character of particular interests. Even if exacting review outside the Bill of Rights is restricted to matters of procedure, courts may have to assess the quality of the underlying substantive right—call it fundamental or what we will—in order to fix the appropriate level of procedural protection.<sup>63</sup> Moreover, the Bill of Rights itself is notoriously imprecise, and as a result some liberties which are not enumerated at all have nonetheless been given constitutional shelter. For example, the Supreme Court has held that freedom of association is protected by the first amendment,<sup>64</sup> although it finds no mention in the text. And the right to use contraceptive devices, while not explicitly set forth in the Constitution, falls under the protective umbrella of the right to privacy, which is also not specifically guaranteed but has its source in the penumbra of the first, third, fourth, fifth and ninth amendments.<sup>65</sup> There may be a difference between (1) extrapolating unenumerated liberties from the Bill of Rights—a process in which history and the constitutional text exert a guiding influence—and (2) giving special protection to judicially selected liberties which have no constitutional roots; but it is a subtle difference. Finally, there is some suggestion in *Tate v. Short*,<sup>66</sup> which strikes down the automatic conversion of fines into jail sentences for those unable to make immediate payment, that the new equal protection standard may apply to some substantive matters outside the Bill of Rights, although arguably that decision may implicitly be grounded in the eighth amendment.

Nevertheless, I would not take issue with Judge Tory's view that a general acceptance of the fundamental rights doctrine would carry us back to the free-wheeling days of *Lochner v. New York*; and I could not

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62. See notes 9-13 *supra*.

63. For example, *Goldberg v. Kelly*, 397 U.S. 254 (1970), held that a state cannot terminate public assistance benefits to particular recipients without first affording them an opportunity to be heard, even though less important benefits could be discontinued without a prior hearing:

The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. *Id.* at 262-63.

64. *United States v. Robel*, 389 U.S. 258 (1967).

65. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

66. 401 U.S. 395 (1971).

under any circumstances agree to embark again on that course. Instead, I would hold California's system of educational finance unconstitutional under the traditional requirement that state-imposed inequalities must be rationally related to legitimate governmental objectives. The state interest advanced in support of the current system is, as the majority notes, "to strengthen and encourage local responsibility for control of public education."<sup>67</sup> But although there is a logical connection between local spending decisions and local control, no justification whatever has been offered for the erratic distribution of taxable resources produced by the boundaries which are now drawn.<sup>68</sup> The present distribution of those resources does not strengthen local responsibility for public education in either the affluent or the impoverished school district. The former has no real incentive to exercise responsible control over education, for a wealthy district need do nothing at all to maintain its current advantage, except perhaps engage in some exclusionary zoning. And the poor district which seeks to compete economically has only an incentive to reduce essential non-school services to unacceptable levels or to tax itself at so high a rate as to discourage those with taxable resources from entering the community, thereby assuring its continuing disadvantage. In my judgment, a state program which functions so haphazardly in relation to its objectives cannot survive scrutiny under a sensible application of the traditional requirement of rationality.

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67. 5 Cal. 3d at 610, 487 P.2d at 1260, 96 Cal. Rptr. at 620.

68. See A. WISE, *RICH SCHOOLS, POOR SCHOOLS* 121-33 (1968).